

Appeal No. 2006AP1379-CR

Cir. Ct. No. 2006CF19

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

FILED

V.

NOV 21, 2007

BRUCE DUNCAN MACARTHUR,

David R. Schanker
Clerk of Supreme Court

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

Bruce MacArthur is charged with several counts of sexual assault involving three child victims. The assaults allegedly occurred from 1966 to 1972. MacArthur met the children in his work as a hospital chaplain. This case presents three issues of first impression in Wisconsin. The first is whether the statute of limitations for child sexual assault in effect when this crime was charged, WIS. STAT. § 939.74 (2005-06),¹ applies to crimes committed before the enactment of WIS. STAT. ch. 948. The second issue is whether the judge or the jury decides if the statute of limitations bars prosecution where the State argues that the statute of

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted. The statute has been amended since the 2005-06 version of the statutes was published, but those changes do not affect the issues raised by this appeal. The issues we certify apply equally to the statute as it has been amended.

limitations has been tolled because the defendant left the State of Wisconsin. The third issue is what burden of proof applies to resolving whether the statute of limitations has been tolled.

PROCEDURAL HISTORY

On January 18, 2006, the State charged Bruce MacArthur with multiple counts of sexual assault against a child pursuant to WIS. STAT. §§ 944.10(1), 944.10(3), 944.11(1) and 944.11(2) (1966-67). The assaults allegedly occurred between March 1965 and June 1972 against three children MacArthur met when he was a chaplain at the former St. Joseph's Hospital in Beaver Dam. MacArthur moved to dismiss the charges based on the statute of limitations. The circuit court denied the motion to dismiss. We granted MacArthur's petition for leave to appeal and the State's petition for cross-appeal.

WHICH STATUTE OF LIMITATIONS APPLIES?

The first question we certify is whether WIS. STAT. § 939.74(2)(c), the statute of limitations in effect when these charges were brought against MacArthur in 2006, applies to crimes committed before the enactment of WIS. STAT. ch. 948.

The State contends that this case is governed by the statute of limitations in effect when these crimes were allegedly committed, between 1965 and 1972, which provided that felony prosecutions must be brought within six years. WIS. STAT. § 939.74 (1965). This time is tolled by any periods during which the defendant is not a public resident of this state. Section 939.74(3) (1965). The State argues that where, as here, the statute of limitations has been replaced or amended, a cause of action that has accrued prior to the effective date

of the new statute or amendment is governed by the prior statute unless the legislature specifies otherwise, citing WIS. STAT. §§ 990.06,² § 991.07,³ and *State v. Hamilton*, 2002 WI App 89, ¶11, 253 Wis. 2d 805, 644 N.W.2d 243 (prior statute of limitations applies to crimes committed before the effective date of the new statute unless the legislature specifies otherwise). The State argues that the six-year limitation period was tolled because MacArthur left the State in 1970.

² WISCONSIN STAT. § 990.06 provides:

Repeal or change of law limiting time for bringing actions. In any case when a limitation or period of time prescribed in any act which shall be repealed for the acquiring of any right, or barring of any remedy, or for any other purpose shall have begun to run before such repeal and the repealing act shall provide any limitation or period of time for such purpose, such latter limitation or period shall apply only to such rights or remedies as shall accrue subsequently to the time when the repealing act shall take effect, and *the act repealed shall be held to continue in force and be operative to determine all such limitations and periods of time which shall have previously begun to run unless such repealing act shall otherwise expressly provide.*

(Emphasis added.)

³ WISCONSIN STAT. § 991.07 provides:

Statutes of limitation. In any case when a limitation or period of time prescribed in any act which is hereby repealed for the acquiring of any right or the barring of any remedy or for any other purpose shall have begun to run and a limitation or period of time for such purpose shall be prescribed in these revised statutes, the limitation or period prescribed by these statutes shall be held to apply only to such rights or remedies as shall accrue subsequently to the time when the same shall take effect; and *the act repealed shall be held to continue in force and operative to determine all such limitations and periods of time, which shall have previously begun to run, unless in special cases in these revised statutes a different rule shall be prescribed*

(Emphasis added.)

MacArthur's primary argument is that the statute of limitations in effect when the charges were brought applies to this case, WIS. STAT. § 939.74.⁴ The statute of limitations in effect when the charges were brought provided that child sexual assault prosecutions must be brought within six years or before the victim reaches the age of forty-five years old, whichever is later.⁵ Section 939.74(1) and (2)(c). Like the statute of limitations in effect when the crimes were committed, this time is tolled by any periods during which the defendant is not a public resident of this state. Section 939.74(3). MacArthur contends that the legislature specified that this statute should apply in exception to the general rule that statute of limitations apply only prospectively because the legislature stated

⁴ WISCONSIN STAT. § 939.74 provides:

Time limitations on prosecutions. (1) Except as provided in [sub. 2]..., prosecution for a felony must be commenced within 6 years ... after the commission thereof....

(2) Notwithstanding that the time limitation under sub. (1) has expired:

....

(c) A prosecution for violation of s. 948.02(2) ... shall be commenced before the victim reaches the age of 45 years or be barred....

....

(3) In computing the time limited by this section, the time during which the actor was not publicly a resident within this state ... shall not be included.

The statute of limitations in effect when the crimes were committed did not contain subsection (2)(c).

⁵ As mentioned above, the statute of limitations has been amended since the charges were brought against MacArthur and now provides that child sexual assault charges may be brought at any time. *See* 2005 Wis. Act 276, §§ 1 and 2. The questions we certify also apply to the statute as amended.

that the act creating § 939.74(2)(c) “applies to actions not barred on the effective date of this subsection” of the statute. MacArthur reasons that the action here was not barred on the effective date of § 939.74(2)(c) if, as the State argues, the statute of limitations had been tolled because MacArthur left the state. *See* 2003 Wis. Act 279, § 10(2). MacArthur contends this action is barred under § 939.74(2)(c) because the victims had all reached forty-five years of age when the charges were brought.

The State finds flaws in MacArthur’s reasoning, countering that the legislature never expressly provided that WIS. STAT. § 939.74(2)(c) should apply in exception to the general rule that statute of limitations apply only prospectively. The State reasons that, when the legislature amended § 939.74 in 1987, adding section (2)(c) and simultaneously creating ch. 948, it stated: “This act applies to offenses occurring on or after the effective date of this SECTION,” which was July 1, 1989. *See* 1987 Wis. Act 332, §§ 27, 55, 65, 66a. The State points out that these offenses did not occur “on or after” July 1, 1989, so § 939.74(2)(c) as initially enacted or subsequently amended does not apply to actions that occurred prior to July 1, 1989. The State points out that only in post-1989 amendments of § 939.74(2)(c) did the legislature provide that § 939.74(2)(c) “applies to actions not barred on the effective date of this subsection.” *See* 2003 Wis. Act 279, § 10(2). The State argues that the “actions” referred to include only ch. 948 offenses because 1987 Wis. Act 332 made § 939.74(2)(c) applicable only to offenses occurring on or after July 1, 1989.

As a separate argument, the State contends that, even if the controlling statute of limitations is the one in effect when MacArthur was charged, the victim-age limitation of WIS. STAT. § 939.74(2)(c) serves only to *expand* the statute of limitations in cases where the standard six-year limitations period for

felonies set forth in sub. (1) has expired, not to contract the statute of limitations. Here, the six-year standard statute of limitations had not expired because it had been tolled by the public resident provision.

In sum, we ask the court to decide what statute of limitations applies to this case. That is, does WIS. STAT. § 939.74 (2)(c), the statute of limitations in effect when MacArthur was charged, apply to crimes committed before the enactment of WIS. STAT. ch. 948?⁶ If so, does subsection (2)(c) serve only to expand the statute of limitations or does it apply even where the six-year standard limitations period has not expired, thus barring prosecution in this case?

PUBLIC RESIDENT TOLLING: JUDGE OR JURY? BURDEN OF PROOF?

The next issues we certify are whether the circuit court or the jury should decide if the statute of limitation bars prosecution where the State invokes the “public resident” tolling provision of WIS. STAT. § 939.74(3),⁷ and what burden of proof applies to the issues to be decided. Wisconsin law is unclear with respect to who decides statute of limitations challenges in criminal cases and with respect to what burdens of proof apply.

The circuit court noted in its decision that the parties agreed that the statute of limitations acts as an affirmative defense and that MacArthur thus had the initial burden to raise the issue. *See State v. Slaughter*, 200 Wis. 2d 190, 198, 546 N.W.2d 490 (Ct. App. 1996). The circuit court concluded that MacArthur had

⁶ This question also applies to the recently amended WIS. STAT. § 939.74(2)(c).

⁷ Regardless of which statute of limitations applies, they all have a public resident tolling provision.

met this burden by raising the motion to dismiss based on the statute of limitations, so the burden shifted to the State to show that the public resident tolling provision of the statute of limitations applied by the preponderance of the evidence to survive a pretrial motion to dismiss. The circuit court further concluded that, should MacArthur raise the issue at trial, the State would have to prove to the jury that MacArthur was not a resident beyond a reasonable doubt.

MacArthur argues that, after he has raised the statute of limitations defense, the burden shifted to the State to prove that the tolling provision applies beyond a reasonable doubt. MacArthur contends that the circuit court should decide this issue before the prosecution proceeds any further. He contends that “[i]t would defeat the purpose of the statute of limitations to let prosecution go forward and let the jury decide whether the statute of limitations should have defeated prosecution” because “[t]olling is an issue ... [that] is determinative of whether prosecution can even take place.” He points out that Wisconsin precedent on a similar issue—venue—holds that the State’s burden is beyond a reasonable doubt. *See Smazal v. State*, 31 Wis. 2d 360, 363-64, 142 N.W.2d 808 (1966).

The State urges us to follow the cases from other jurisdictions that have held that, when a defendant makes a statute of limitations challenge to a criminal prosecution before trial, the State should be required to show compliance with the statute of limitations by a preponderance of the evidence, including any applicable tolling provisions. The State argues that at trial it must prove beyond a reasonable doubt that the charged crime occurred on or about the alleged date, but that only in limited situations does the jury need to specifically determine the date. The State reasons:

Only if the evidence at trial were to suggest a *variance* from the information as to the alleged date, or date range, of a

charged crime, *and only if* the defendant complains at trial that the variance would create a limitations bar must the trial court specifically instruct the jury to determine the date, or date range, beyond a reasonable doubt. In such cases, the trial court must revisit the limitations issue after trial and acquit the defendant *only if* the date, or date range, found by the jury would result in a limitations bar based on the court's pretrial determination of the issue.

The parties point to cases showing a division of opinion among other jurisdictions regarding whether the prosecutor's burden to prove that a statute of limitations has not expired is "beyond a reasonable doubt" or by a "preponderance of the evidence." See *United States v. Owens*, 965 F. Supp. 158, 162-63 (D. Mass. 1997) (whether a statute of limitations is tolled because the defendant fled should be decided by the jury beyond a reasonable doubt); *Commonwealth v. Cogswell*, 583 N.E.2d 266, 269 (Mass. App. Ct. 1991) (burden on prosecution is beyond a reasonable doubt); *State v. Pierce*, 782 P.2d 194, 196 (Utah Ct. App. 1989) (holding that the burden is beyond a reasonable doubt); *but see United States v. Gibson*, 490 F.3d 604, 608 (7th Cir. 2007) (to toll the statute of limitations, the government must prove by a preponderance of the evidence that the defendant fled); *United States v. Florez*, 447 F.3d 145, 149 (2d Cir. 2006) (whether a statute of limitations is tolled because a defendant was fleeing justice is an issue to be determined by the trial court by the preponderance of the evidence); *United States v. Greever*, 134 F.3d 777, 781 (6th Cir. 1998) (government must show by a preponderance of the evidence that the defendant's actions tolled the statute of limitations); *People v. Zamora*, 557 P.2d 75, 93 n.27 (Cal. 1976) (burden is on the prosecutor by a preponderance of the evidence).

In sum, we ask the court to decide whether the State must show that the statute of limitations has been tolled by a preponderance of the evidence or beyond a reasonable doubt. We also ask the court to decide whether these

questions should be answered by the circuit court or the jury or both. Pursuant to WIS. STAT. RULE 809.61, this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.⁸

⁸ MacArthur has raised other issues that we have not addressed in this certification because we believe that they can be resolved by existing precedent.

